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Testimony of Thomas J. Welsh

In SUPPORT of

HB5639 (Section 112)
An Act Concerning Connecticut's Leadership In
Corporation and Business Law

Judiciary Committee
March 23, 2016

Honorable Chairs and Members of the Judiciary Committee:

It is a pleasure to address you today relating to the provisions of Section 112 of HB5639 "An Act Concerning Connecticut's Leadership In Corporation and Business Law". I am only addressing this section of this Bill on behalf of Connecticut Bar Association's Commercial Finance Section relating to the amendment to Article 4A of the Uniform Commercial Code.

I am an attorney and a principal of the law firm of Brown & Welsh, P.C. in Meriden, Connecticut. I am the Legislative Liaison and immediate past Chair of the Commercial Finance Section of the Connecticut Bar Association, in which capacity I am testifying before you today.

Article 4A of the Uniform Commercial Code relates to "funds transfers", meaning a series of transactions beginning with an originator's payment order to a receiving bank for the purpose of making payment to the beneficiary of the order. These transactions can occur between originating and receiving banks directly or, most often, through a series of intermediary banks. Article 4A provides the uniform state law background underlying these funds transfers – however federal law, most notably Electronic Funds Transfer Act of 1978 (Title XX, Public Law 95-630, 92 Stat. 3728, 15 U.S.C. Sec. 1693 et. seq.) ("EFTA"), may apply in certain situations and provide additional rights and remedies.

In deference to federal law supremacy and the consumer protection provisions of EFTA that are not included in Article 4A, Section 4A-108 of the Uniform Commercial Code (enacted in Connecticut as Conn. Gen. Stat. §42a-4-108) was drafted to make clear that Article 4A would not apply to a funds transfer "any part of which is governed by [EFTA]" (emphasis added).

Unfortunately, as a result of recent amendments to the federal law in the recent Dodd-Frank legislation, it became clear that some "remittance transfers"¹ otherwise governed by EFTA would be excluded from EFTA².

¹ Such "remittance transfers" generally involve transfers of funds through electronic means by consumers to recipients in another country through persons or financial institutions that provide such transfers in the normal course of their business.

² Not all "remittance transfers" as defined in EFTA, however, qualify as "electronic fund transfers" as defined under the EFTA, 15 U.S.C. Sec. 1693a(7).



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In addition, portions of the transaction (for example an initial payment order by a commercial entity or bank) might not be governed by EFTA while other portions (for example, the deposit of the funds unto a bank account of a consumer) might be governed by EFTA. This could result in a situation where EFTA would not apply to a portion of a transaction and the 'blanket' exclusion in UCC §4A-108 would also make Article 4A not apply – potentially resulting in no governing law. The technical revisions in Section 112 of the proposed Bill are intended by the promulgators of the Uniform Commercial Code³ to address this problem.

The proposed revisions to Conn. Gen. Stat. §4A-108 will allow Article 4A to govern portions of funds transfers that are not governed by EFTA when only a portion of the transaction is governed by the federal law. The provision for supremacy of federal legislation is also preserved in the revised text.

While subsection (a) of the proposed bill broadly states that Article 4A does not apply to any funds transfer that is governed in any part by EFTA, subsection (b) provides an exception. The purpose of subsection (b) is to allow this Article to apply to a funds transfer that also is a remittance transfer as defined in EFTA, so long as that remittance transfer is not an electronic fund transfer as defined in EFTA. Subsection (c) also makes clear that if the resulting application of this Article to an EFTA-defined "remittance transfer" that is not an EFTA-defined "electronic fund transfer" creates an inconsistency between an applicable provision of Article 4A and an applicable provision of EFTA, as a matter of federal supremacy, the provision of EFTA governs to the extent of the inconsistency.

This proposed Bill creates a more nuanced approach that assures that every portion of these transactions will have applicable law to govern them in the event of a dispute. A copy of the relatively short NCCUSL revision and comments is attached to this testimony to provide additional examples for your consideration and information.

The Uniform Laws Commission reports that 44 states have now adopted this revision to UCC Article 4A and that, in addition to Connecticut, the states of Kansas and Oklahoma have introduced legislation to consider adopting these revisions this year. The adoption of these amendments in Connecticut will make its laws and practice generally conform to that of other states adopting these relatively noncontroversial amendments and will remove any perceived disincentive for consumers and for industry and financiers in Connecticut.

The Connecticut Bar Association Commercial Finance Section and the Commercial Law and Bankruptcy Section support adoption in Connecticut of this limited technical amendment to Article 4A of the Uniform Commercial Code.

We look forward to your consideration of this Bill and recommend its approval.

³ The National Conference of Commissioners of Uniform State Laws ("NCCUSL") and the American Law Institute ("ALI") jointly adopt and amend the UCC and adopted this proposed revision to resolve this problem in 2012. A copy of the amendment and official comments on the text and examples are attached to this material for your information and consideration.



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**AMENDMENT TO
UNIFORM COMMERCIAL CODE ARTICLE 4A**

Approved by the Executive Committee of the
National Conference of Commissioners on Uniform State Laws
June 23, 2012

Section 4A-108 is amended to read:

**SECTION 4A-108. EXCLUSION OF CONSUMER TRANSACTIONS GOVERNED BY FEDERAL LAW
RELATIONSHIP TO ELECTRONIC FUND TRANSFER ACT.**

(a) Except as provided in subsection (b), this Article does not apply to a funds transfer any part of which is governed by the Electronic Fund Transfer Act of 1978 (Title XX, Public Law 95-630, 92 Stat. 3728, 15 U.S.C. Sec. 1693 et. seq.) as amended from time to time.

(b) This Article applies to a funds transfer that is a remittance transfer as defined in the Electronic Fund Transfer Act (15 U.S.C. Sec. 1693o-1) as amended from time to time, unless the remittance transfer is an electronic fund transfer as defined in the Electronic Fund Transfer Act (15 U.S.C. Sec. 1693a) as amended from time to time.

(c) In a funds transfer to which this Article applies, in the event of an inconsistency between an applicable provision of this Article and an applicable provision of the Electronic Fund Transfer Act, the provision of the Electronic Fund Transfer Act governs to the extent of the inconsistency.

Official Comment

~~The Electronic Fund Transfer Act of 1978 is a federal statute that covers a wide variety of electronic funds transfers involving consumers. The types of transfers covered by the federal statute are essentially different from the wholesale wire transfers that are the primary focus of Article 4A. Section 4A-108 excludes a funds transfer from Article 4A if any part of the transfer is covered by the federal law. Existing procedures designed to comply with federal law will not be affected by Article 4A. The effect of Section 4A-108 is to make Article 4A and EFTA mutually exclusive. For example, if a funds transfer is to a consumer account in the beneficiary's bank and the funds transfer is made in part by use of Fedwire and in part by means of an automated clearing house, EFTA applies to the ACH part of the transfer but not to the Fedwire part. Under Section 4A-108, Article 4A does not apply to any part of the transfer. However, in the absence of any law to govern the part of the funds transfer that is not subject to EFTA, a court might apply appropriate principles from Article 4A by analogy.~~

Substitute this new comment for the old that is reproduced above, for ease of reading the new comment is not underlined:

1. The Electronic Fund Transfer Act (EFTA), implemented by Regulation E, 12 C.F.R. Part 1005, is a federal statute that covers aspects of electronic fund transfers involving consumers. EFTA also governs remittance transfers, defined in 15 U.S.C. Sec. 1693o-1, which involve transfers of funds through electronic means by consumers to recipients in another country through persons or financial institutions that provide



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such transfers in the normal course of their business. Not all "remittance transfers" as defined in EFTA, however, qualify as "electronic fund transfers" as defined under the EFTA, 15 U.S.C. Sec. 1693a(7). While Section 4A-108(a) broadly states that Article 4A does not apply to any funds transfer that is governed in any part by EFTA, subsection (b) provides an exception. The purpose of Section 4A-108(b) is to allow this Article to apply to a funds transfer as defined in Section 4A-104(a) (see Section 4A-102) that also is a remittance transfer as defined in EFTA, so long as that remittance transfer is not an electronic fund transfer as defined in EFTA. If the resulting application of this Article to an EFTA-defined "remittance transfer" that is not an EFTA-defined "electronic fund transfer" creates an inconsistency between an applicable provision of this Article and an applicable provision of EFTA, as a matter of federal supremacy, the provision of EFTA governs to the extent of the inconsistency. Section 4A-108(c). Of course, applicable choice of law principles or enforceable choice of law provisions in an applicable agreement will also affect whether Article 4A will apply to all or part of any funds transfer, including a remittance transfer. See Section 4A-507. The following examples assume that choice of law principles or an enforceable choice of law provision will lead a court to examine the applicability of Article 4A to the funds transfer.

2. The following examples illustrate the relationship between EFTA and this Article pursuant to Section 4A-108.

Example 1. A commercial customer of Bank A sends a payment order to Bank A, instructing Bank A to transfer funds from its account at Bank A to the account of a consumer at Bank B. The funds transfer is executed by a payment order from Bank A to an intermediary bank and is executed by the intermediary bank by means of a clearinghouse credit entry to the consumer's account at Bank B (the beneficiary's bank). The transfer into the consumer's account is an electronic fund transfer as defined in 15 U.S.C. Sec. 1693a(7). Pursuant to Section 4A-108(a), Article 4A does not apply to any part of the funds transfer because EFTA governs part of the funds transfer. The funds transfer is not a remittance transfer as defined in 15 U.S.C. Sec. 1693o-1 because the originator is not a consumer customer. Thus Section 4A-108(b) does not apply.

A court might, however, apply appropriate principles from Article 4A by analogy in analyzing any part of the funds transfer that is not subject to the provisions of EFTA or other law, such as the obligation of the intermediary bank to execute the payment order of the originator's bank.

Example 2. A consumer originates a payment order that is a remittance transfer as defined in 15 U.S.C. Sec. 1693o-1 by providing the remittance transfer provider (Bank A) with cash in the amount of the transfer plus any relevant fees. The funds transfer is routed through an intermediary bank for final credit to the designated recipient's account at Bank B. Bank A's payment order identifies the designated recipient by both name and account number in Bank B, but the name and number provided identify different persons. This remittance transfer is not an electronic fund transfer as defined in 15 U.S.C. Sec. 1693a(7) because it is not initiated by electronic means from a consumer's account, but does qualify as a funds transfer as defined in Section 4A-104. Both Article 4A and EFTA apply to the funds transfer. Sections 4A-102, 4A-108(a), (b). Article 4A's provision on mistakes in identifying the designated beneficiary, Section 4A-207, would apply as long as not inconsistent with the governing EFTA provisions. Section 4A-108(c).

Example 3. A consumer originates a payment order from the consumer's account at Bank A to the designated recipient's account at Bank B located outside the United States. Bank A uses the CHIPS system to



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execute that payment order. The funds transfer is a remittance transfer as defined in 15 U.S.C. Sec. 1693o-1. This transfer is not an electronic fund transfer as defined in 15 U.S.C. Sec. 1693a(7) because of the exclusion for such types of transfers in 15 U.S.C. Sec. 1693a(7)(B), but qualifies as a funds transfer as defined in Section 4A-104. Under Sections 4A-102 and 4A-108(b), both Article 4A and EFTA apply to the funds transfer. The EFTA will prevail to the extent of any inconsistency between EFTA and Article 4A. Section 4A-108(c). For example, suppose the consumer subsequently exercised the right to cancel the remittance transfer under the right given under EFTA and obtain a refund. Bank A would be required to comply with the EFTA rule concerning cancellation even if Article 4A prevents Bank A from cancelling or reversing its payment order it sent to its receiving bank. Section 4A-211.

Example 4. A person fraudulently originates an unauthorized payment order from a consumer's account through use of an online banking interface. This transaction is an electronic fund transfer as defined in 15 U.S.C. Sec. 1693a(7) and would be governed by EFTA and not Article 4A. Section 4A-108(a). Whether the funds transfer also qualifies as a remittance transfer under 15 U.S.C. Sec. 1693o-1 does not matter to the application of Article 4A.

Example 5. A person fraudulently originates an unauthorized payment order from a consumer's account at Bank A through forging written documents that are provided in person to an employee of Bank A. This funds transfer is not an electronic fund transfer as defined in 15 U.S.C. Sec. 1693a(7) because the fund transfer from the consumer's account is not initiated by electronic means, but the funds transfer qualifies as a funds transfer as defined in Section 4A-104. Article 4A will apply to this funds transfer regardless of whether the funds transfer also qualifies as a remittance transfer under 15 U.S.C. Sec. 1693o-1. If the funds transfer is not a remittance transfer, the provisions of Section 4A-108 are not implicated because the funds transfer does not fall under EFTA, and the general scope provision of Article 4A governs. Section 4A-102. If the funds transfer is a remittance transfer, and thus governed by EFTA, Section 4A-108(b) provides that Article 4A also applies. The provisions of Article 4A will allocate the loss arising from the unauthorized payment order as long as those provisions are not inconsistent with the provisions of the EFTA applicable to remittance transfers. Section 4A-108(c).

3. Regulation J, 12 C.F.R. Part 210, of the Federal Reserve Board addresses the application of that regulation and EFTA to fund transfers made through Fedwire. Fedwire transfers are further described in Official Comments 1 and 2 to Section 4A-107. In addition, funds transfer system rules may be applicable pursuant to Section 4A-501.

Legislative Note: *In some states deference to possibly changing federal law, as in "the Electronic Fund Transfer Act of 1978 as amended from time to time," may constitute an unlawful delegation of legislative power, or the issue may be unresolved. In such instances, the references to "as amended from time to time" may be deleted. In these cases, if the federal law is changed, the legislature will have to amend the state law as necessary or, if permitted by state law, power may be delegated to a state agency to amend the statute by appropriate means.*